LIBRARY
SUPREME COURT, U. S.

FILED
JUL 12 1967
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 355

ALL CONCESSIONS, INC.,
PETITIONER,

v.

CITY OF PEABODY,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

EDWARD J. DAVIS
50 State Street
Boston, Massachusetts
Attorney for Petitioners

Blanchard Press, Inc., Boston, Mass. — Law Printers

TABLE OF CONTENTS

	Page
Opinion of the Court Below	2
Jurisdiction	2
Questions Presented	3
Certiorari — Grounds	3
Constitutional Provisions and Statutes Involved	4
Statement of Case	5
Reasons for Granting Writ	13
Conclusion	23
Appendix A	24
Appendix B	28
Appendix C	29
Appendix D	31

Table of Citations

Boom Co. v. *Patterson*, 98 U.S. 403	15
Chicago Burlington R.R. v. *Chicago*, 166 U.S. Reports 226	3, 13, 14, 15, 21
Edwin Moss and Sons, Inc. v. *Newman E. Argraves, Highway Commisisoner*, 148 Conn. 734, 173 A.2d 505	15, 17
Roberts, Receiver, et al. v. *New York City, et al.*, 295 U.S. 264	3, 19, 20, 21
United States v. *Cors*, 325 U.S. at 332	16
United States v. *Virginia Electric & Power Co.*, 365 U.S. 624	16
Winston v. *U. S.*, 342 F.2d 715, 9th Cir. 1965	23

Constitutional Provisions

Fourteenth Amendment to the U. S. Constitution	2, 3, 4, 13, 16, 20, 21, 22

Statutes

Page

28 U.S.C.A. Sec. 1257 (3) 2, 5

Miscellaneous

American Bar Association: Section of Municipal Law: Committee on Condemnation Procedure: Report 1959-1961. 1960 Report of Committee. Valuation of Lands Containing Minerals or Other Special Features, pages 55-60; 1961 Report of Committee; Reports of 1962, 1963, 1964, 1965 & 1966 14-15

In the Supreme Court of the United States

OCTOBER TERM, 1967

No.

ALL CONCESSIONS, INC.,
PETITIONER,

v.

CITY OF PEABODY,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

Petitioner, All Concessions, Inc., by its attorney, prays that a writ of certiorari issue to review the judgment of the Supreme Judicial Court of the Commonwealth of Massachusetts, upon which final judgment was entered on February 27, 1967.

On May 25, 1967, it was ordered by this Court that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including 12 July, 1967, without prejudice to the Court's consideration of whether this application has been filed in time.

There is appended to the Petition an attested certificate of docket entries in the case from the Clerks' Office of the Superior Court for Essex County, Massachusetts, showing that final judgment was entered for the Respondent City of Peabody against this Petitioner on February 27, 1967.

Opinion of the Court Below

The Supreme Judicial Court For The Commonwealth of Massachusetts, on December 30, 1966, ordered, that the following entry be made in the docket; viz.,—Exceptions overruled. The Court's decision appears in Massachusetts Supreme Court Reports, Advanced Sheets, pages 1427, 1428, a copy of which is appended to this petition.

On January 6, 1967, your Petitioner, All Concessions, Inc., requested the Supreme Judicial Court of Massachusetts for a rehearing of the case by the Court, and the same was denied on January 31, 1967.

Matters for review below in the Supreme Judicial Court of Massachusetts were brought by this Petitioner's Bill of Exceptions which contained "all the matters pertinent to Intervening Petitioner's Exceptions". (R. 28)

Jurisdiction

Jurisdiction of this Court is invoked under 28 U.S.C. s. 1257(3).

Violation of your Petitioner's rights under the Fourteenth Amendment of the Constitution of the United States was invoked by this Petitioner in its argument before the Supreme Judicial Court of Massachusetts as set out in its Brief before the said Court and appended hereto.

Questions Presented

I. It is apparent on the record, that the trial court's ruling to which your Petitioner duly excepted, denying the Petitioner's Motion To Strike The Evidence of Walter A. Conway, the sole real estate expert of the Respondent, violated the rights of the Petitioner for due process and just compensation for its property taken by the Respondent by eminent domain, as guaranteed by the Fourteenth Amendment of the Constitution of the United States, and was prejudicial error.

II. It is apparent on the record, that the trial court's ruling to which your Petitioner duly excepted, denying its Motion For a New Trial on the grounds that the jury's verdict was against the law, since it violated the rights of the Petitioner for due process and just compensation for its property taken by the Respondent by eminent domain, as guaranteed by the Fourteenth Amendment of the Constitution of the United States, and was prejudicial error.

III. It is apparent on the record that the jury's verdict cannot be sustained on grounds, exclusive of the Federal question raised under the Fourteenth Amendment to the Constitution of the United States.

Certiorari — Grounds

1. The decision of the appellate court below is in conflict with *Chicago Burlington R.R.* v. *Chicago*, 166 U.S. 226., and *Roberts, Receiver, et al* v. *New York City, et al*, 295 U.S. 264, in the denial to this Petitioner of due process and just compensation guaranteed in the Fourteenth Amendment to the Constitution of the United States.

The case reaches the required criteria stated in *Roberts, Receiver, et al* v. *New York City, et al*, 295 U.S. 264, relating to eminent domain cases coming from the state

courts to this Court for relief, where as apparent on the record here, there is an absolute disregard of a condemnee's right of due process and just compensation guaranteed by the Fourteenth Amendment of the Constitution of the United States; the case in itself being of substantial magnitude.

2. The case directly presents for decision the paramount right of a condemnee, for due process and just compensation under the Constitutional guarantees of the Fourteenth Amendment of the United States as against the denial thereof, in the application of a procedural and evidentiary rule, where there was absent the right and opportunity of the condemnee to act to protect its constitutional right at the trial. It is submitted that this is the invasion of a freedom under a guarantee of the United States Constitution which is of important public significance.

3. There was no evidence to support the jury's verdict under the basic principle governing a reviewing court in its review of a jury's verdict, as generally applied in the Federal Courts in an eminent domain case, which on the application of the Constitutional guarantee of due process and just compensation under the Fourteenth Amendment, precludes the evidence of the sole real estate expert of the Respondent, and the verdict as not supported by competent evidence.

Constitutional Provisions and Statutes Involved

I. The Fourteenth Amendment provides—

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

II. 28 U.S.C.A. sec. 1257 (3) states:

> "By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a state statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

Statement of Case

The Petitioner, All Concessions, Inc., is a Massachusetts corporation, of Everett, Massachusetts. (R. 58, Petition To Intervene)[1]

This case arose on a petition of the petitioners, Emma J. Leonardi, Jean V. Fornari and Patricia B. Nazzaro as owners, and that of the Intervening Petitioner as Lessee, in Essex County Superior Court, Common Law, No. 129208, for assessment of damages following a taking of land on November 14, 1963, by eminent domain by the respondent, City of Peabody. It was agreed by the parties that no question was raised as to title, as to the validity of the taking, or as to the respective interests of the Petitioners and In-

---

[1] Reference is made to aforementioned docket entries which shows no answer of the respondent to the petition of All Concessions, Inc. G.L. of Massachusetts c. 231, § 30 provides:

> If it is alleged in any civil action or proceeding . . . that a party . . . is a corporation . . . such allegation shall be taken as admitted unless the party controverting it files in court, within the time allowed for the answer thereto, or within ten days after the filing of the paper containing such allegation, or within such further time as the court may allow on motion and notice, a special demand for its proof. As amended St.1949, c. 179.

tervening Petitioner, which were a subject of stipulation as to apportionment of damages. The land was taken in fee, including structures thereon, and consisted of 34.53 acres in West Peabody. (R. 1)

It was agreed at the trial before a jury that the only issue was the fair market value of the land as of the date of the taking. The jury returned a verdict of seventy thousand ($70,000.00) dollars for the petitioning parties. (R. 1)

The parties petitioners, Emma J. Leonardi, Jean V. Fornari, Patricia B. Nazzaro and All Concessions, Inc., excepted to the denial of their motion to strike out the evidence of Walter A. Conway, the sole real estate expert witness of the respondent, and the Intervening Petitioner, All Concessions, Inc., also excepted to the Court's denial of the motion of the Petitioners and Intervening Petitioner for New Trial. (R. 2)

Three qualified expert real estate witnesses for the Petitioners testified that the fair market value of the subject property, as of the time of the taking, was respectively $300,000, $325,000 and $350,000 and that the highest and best use thereof, was for residential apartment houses. (R. 2-11)

The evidence of the Petitioners was that there was enough fill on the location for site preparation for building purposes. (R. 6)

The sole real estate expert witness for the Respondent was one Walter A. Conway. (R. 13-19). He testified that he was in the real estate and insurance business, fifty percent of his business being in real estate, and that he had no qualifications as an architect or as an engineer. (R. 16)

In direct examination, he testified:

> That the subject property was not in good business location, not a good apartment house location, and not a good industrial site, because better industrial sites

were available in Peabody, with roads and all utilities installed, for $3,000.00 an acre. (R. 14). That in making the appraisal of the subject property he completely ignored all zoning. (R. 14)

That in the surrounding area contractors were paying wholesale price of $1500.00 for lots which had 15,000 square feet or a little more per lot. That for acreage it ran anywhere from $500.00 to a high of $3,000.00 for a good buildable land. (R. 14)

That the existence of water-ways and brooks, and what his examination disclosed in the springtime, indicated to him that fill was going to be required. (R. 14)

He further testified:

"I then wanted to figure out what would be fair and equitable to pay for this land. I assumed that somebody would buy it for some reason or other. Actually, my marketability was restricted to municipality because I didn't know anyone else that could even take it and spend enough money to make it usable. But, I took the area and first assumed that it would require a minimum of a cubic yard of fill throughout. Well, a cubic yard of fill in November 14, 1963 was selling for $1.55 a yard and up. That meant that it was going to cost $7,500 for fill per acre which was twice as much and more than twice as much as the highest sale of good land.

"So then I said, well, perhaps they can get away with 18 inches of fill; and that dropped my price down to $3,750. And that was still overpriced.

"So then I said, well, maybe through some fortuitous circumstances the owner can buy fill cheap and he can spread it for one dollar a yard for 18 inches. Then that reduced it to $2,500.

"Then I said, well, maybe he can get the top price, $3,000, less the $2,500 for the fill; that makes it $500. Well, at 34½ acres, that was 17,000 some odd dollars, and I said, well, let's round this off to $20,000." (R. 14 and 15) (Italics Supplied)

The witness testified that he added $15,000 for the structure on the property, to arrive at a figure of $35,000.00 (R.15)

He testified that he never had examined site specifications referable to the Junior High School erected on the site by the Respondent since the taking; that *he did not make an estimate of the amount of gravel that was on the subject property.* (R. 16) (Italics supplied)

He testified:

"Q. So that what you simply did, you walked around on the land and you made a conclusion with respect to the qualities of this soil for building with no consultation with experts in their own field? A. In my own field?

Q. In their field. A. I did not consult with any engineer or any architect; when I made my report to the School Committee it was on my own observation." (R. 17)

He testified that his procedure with respect to the School Committee was that he "recommended they get engineers and establish what it was going to cost to prepare that site, because as far as I could see, it was going to be a fabulous amount of money." (R. 17)

The witness was referred to the Specifications for the High School built on the subject property, and testified:

"Q. Are you aware of the fact that the specifications of the property provided that it is the intent of these specifications that no filling will be expected or required within the area to be occupied by the new building. Did you know that? A. No, sir." (R. 17, 18)

He further testified:

"Q. If you were informed that the specifications required the statement that was read in the last question, would you take that information and use it to modify your appraisal? A. As I remember that statement it said no fill was required? 'The facts are, fill was required." (R. 17 & 18) (Italics supplied)

He further testified:

"Q. Now, my question is: Would you assume as an appraiser if the statement made in that question is true, would you modify your appraisal? A. If that statement were true that no fill was required, I probably would modify the appraisal, if that were true that no fill was required." (R. 18) (Italics supplied)

Osbourne Palmer and Gerald Bern were called as witnesses by the Respondent and testified subsequent to the evidence given by the witness Conway.

Witness Palmer testified that he was a civil engineer, a planning consultant for the Respondent and the Clerk of the Works for the erection of the Junior High School building referred to above.

Through witness Palmer, site preparation specifications of the building contract were read into evidence, without objection, which provided:

"It is the intent of these specifications that no filling will be expected or required within the area to be occupied by the new building." (R. 20)

The witness further testified that in fact no filling was required or used in the area occupied by the new school building covering an area of about four to five acres, that the fill taken from the Southwest corner of the subject property was used in the other parts of the property of the school project and no fill was brought from outside to the premises for the purpose of site preparation; except that loam was brought in. (R. 20, 21 and 22)

On direct examination, witness Gerald Bern testified:

That he was a General Contractor and gradual civil engineer; and that he was a civil engineer since 1957.

That he was President and Treasurer of Gil-Bern Construction Company. That this company in August, 1963, entered into a contract for site development work for the respondent for the construction of the ball field and preparing the site for a Junior High School on the subject property. (R. 22)

That the work under the contract consisted of clearing and grubbing the entire site; site excavation and filling to bring the area up to the proposed sub-grades; supplying from off-site sources loam to build the lawn area; installation of the drainage sytem, the water system, the sewer system, the septic tank, the leaching field, the pumping equipment. (R. 22)

That no work was done by his company in the building area; that this was done by P. H. Porter Co. who had the contract for the building. The witness referred to the area in the Southwest section as the only area in which his company had major excavation. That from this area 140,000 cubic yards of fill were excavated and spread on the site altogether by his company and P. H. Porter Co. (R. 22,

23). That the contract specifically provided for no outside fill; tht none from the outside was brought in, and that the 140,000 cubic yards were sufficient for the entire project. (R. 24). That as of the time of the taking, the cost of the fill would be around $2 a cubic yard to be brought to the site and spread; that the cost to spread the 140,000 cubic yards of fill on the subject property would be $80,000 to $100,000.

He testified that the Junior High School under construction on said land was being constructed to take care of 1300 students. His evidence was that the site preparation using the 140,000 cubic yards as aforesaid, in the performance of his company's contract, included fields and playgrounds for the School, and that the same were all safe areas after performance of the contract. (R. 24 & 25)

During and at the termination of the evidence of the said witness Conway, there was not available the evidence of witnesses Palmer and Bern. There was neither the right nor the opportunity at or at the termination of the evidence of Conway for this Petitioner to move to strike his testimony, on the basis that in fact, no fill was required or brought in for the Junior High School project and that 140,000 cubic yards of fill were on the premises as of the time of taking, which were spread and sufficient for the project. The only evidence as to value of the fill came through the witnesses of the Respondent, which on the testimony of Witness Conway would be worth $217,000 on the premises as of the time of taking, and on that of Bern, $280,000 to be brought to the premises, less $80,000 to $100,000 for spreading.

At the close of the evidence, the petitioners made a motion to strike all of the evidence of the witness, Walter A. Conway. The Court denied the motion and noted the exception of the petitioners to the Court's denial of the motion. (R. 27, 28)

This exception was dealt with by the appellate court below as follows:

> "The first (exception) relates to the denial of the petitioners' motion, made at the close of the evidence, that the entire testimony of the city's only qualified witness, who had testified without objection earlier in the trial, be struck from the record. That a party is not as of right entitled to have such a motion allowed has been discussed and decided with full citation of cases in *Crowley* v. *Swanson*, 283 Mass. 82, 85, *Cummings* v. *National Shawmut Bank*, 284 Mass. 563, 566-568 and *Solomon* v. *Dabrowski*, 295 Mass. 358, 359-360."

After the verdict of the jury, the petitioners seasonably filed a motion for a new trial. As one of the reasons for the motion for a new trial, the petitioners assigned the following ground:

> "Because the verdict rendered in said case was against the evidence, the weight of the evidence presented and the law." (R. 28)

The appellate court below on this exception stated:

> "The other exception is to the denial of the motion for a new trial. The considerations which govern the disposition of a motion for a new trial were stated at length in *Bartley* v. *Phillips*, 317 Mass. 35, 40-44, and have been so frequently confirmed and applied by us as not to require repetition. *Haven* v. *Brimfield*, 345 Mass. 529, 533-534. There was no error."

Reasons for Granting Writ

I. It is apparent on the record, that the trial court's ruling to which your petitioner duly excepted, denying the Petitioner's Motion to Strike The Evidence of Walter A. Conway, the sole real estate expert of the Respondent, violated the rights of the Petitioner for due process and just compensation for its property taken by the Respondent by eminent domain, as guaranteed by the Fourteenth Amendment of the Constitution of the United States, and was prejudicial error.

This Petitioner contends that the denial of the petitioner's motion to strike the evidence of the respondents "expert witness" Conway, prescribed a rule of law for the jury which was in absolute disregard of the Appellate's right to just compensation and the Court's action was wanting in the due process of law required by the Fourteenth Amendment of the Constitution of the United States. *Chicago Burlington R.R.* v. *Chicago,* 166 U.S. Reports 226, 246. In the Court's decision, it was held:

> "1) A judgment of a state court, even if authorized by statute, whereby private property is taken for public use, without compensation made or secured to the owner, is, upon principle and authority, wanting in the due process of law required by the Fourteenth Amendment of the United States.
>
> 2) But a State may not, by any of its agencies, disregard the prohibitions of the Fourteenth Amendment. Its judicial authorities may keep within the letter of the statute prescribing forms of procedure in the courts and give the parties interested the fullest opportunity to be heard, and yet it might be that

its final action would be inconsistent with that amendment. In determining what is due process of law regard must be had to substance, not to form.

3) That a verdict of nominal damages by a jury in a proceeding to ascertain the compensation due to a railroad company arising from the opening of a street across its tracks—the "land" not being taken, but the said use taken by the condemnors—on the facts of the case, was not wanting in due process of law under the Constitution.

At page 251 the Court said:

"If prior to the institution of these proceedings, the railroad company had constructed upon the land embraced within the crossing, buildings to be used in its business, it would have been necessary for the jury in ascertaining the just compensation to be awarded, to take into consideration the value of such buildings."

This last proposition stated by the Court has peculiar application to the issue here involved.

In eminent domain cases, it is uniformly held on the authorities that the existence of sand and gravel on a piece of property should be taken into consideration as a factor insofar as it affects the market value of land. This is true even though the sand and gravel are not to be considered as merchandise to be valued separately and the value added to that to which the land would have had if it had contained no sand or gravel. See *American Bar Association*: Section of Municipal Law: Committee on Condemnation Procedure: Report 1959-1961. 1960 Report of Committee. Valuation of Lands containing Minerals or

Other Special Features, pages 55-60; 1961 Report of Committee, same subject, pages 43-46 with a particular reference to *Edwin Moss and Sons, Inc. v. Newman E. Argraves, Highway Commissioner,* 173 A.2d 505; 1962 Report, same subject, pages 45-6; 1963 Report, same subject, pages 45-52; 1964 Report, same subject, pages 39-41; 1965 Report, same subject, pages 40-42; 1966 Report, same subject, pages 43-45.

The appraisal opinion of the witness Conway that the land had a value of $20,000 was expressly predicated on the premise testified to by him as a fact that the property required fill for building purposes, and that in fact the school project required outside fill in contradiction to the respondent's other witnesses that no fill was required for the school project, and that 140,000 cubic yards were on the premises and sufficient for site preparation for the school project.

It is evident on the Court's decision in *Chicago Burlington R.R. v. Chicago, supra,* that a verdict by the jury of nominal damages, if there were buildings on the land taken at the time of taking at a substantial value would violate the requirement of due process, "as it would have been necessary for the jury in ascertaining the just compensation, to take into consideration the value of such buildings". This would rest on the premise that the verdict would violate the test of fair market value of just compensation, as predicated on its definition as set out in *Boom Co. v. Patterson,* 98 U.S. 403, 408, cited in the opinion.

On this principle, it is submitted that in the instant case a deposit of 140,000 cubic yards of gravel fill, worth on the testimony of the expert witness Conway, $1.55 per cubic yard and up, at the time of the taking, which fill was on the subject property at the time of the taking on the evidence of Palmer, the Clerk of the Works of the Respond-

ent and of Bern, President and Treasurer of the site preparation contractor of the Respondent, manifestly precludes the value of the land by Conway at $20,000 for the use of the jury as evidence of value. The disallowance of the petitioner's motion to strike and to allow Conway's appraisal for the jury's consideration prescribe a rule of law for the jury which was in absolute disregard of the petitioner's right and just compensation and the Court's action was wanting in the due process of law required by the Fourteenth Amendment of the Constitution of the United States.

In *U.S.* v. *Cors,* 325 at page 332, in the opinion of the Court it was stated by Mr. Justice Douglas:

> "The Court in its construction of the constitutional provision has been careful not to reduce the concept of 'just compensation' to a formula. The political ethics reflected in the Fifth Amendment reject confiscation as a measure of justice. But the Amendment does not contain any definite standards of fairness by which the measure of 'just compensation' is to be determined. *United States ex rel. T. V. A.* v. *Powelson,* 319 U.S. 266, 279-280; *United States* v. *Petty Motor Co.,* 327 U.S. 372, 377. The Court in an endeavor to find working rules that will do substantial justice has adopted practical standards, including that of market value. *United States* v. *Miller,* 317 U.S. 369, 374. But it has refused to make a fetish even of market value, since that may not be the best measure of value in some cases."

In *U.S.* v. *Virginia Electric & Power Co.,* 365 U.S. 624 at page 633, in the opinion of the Court it was stated by Mr. Justice Stewart:

> "The guiding principle of just compensation is reimbursement to the owner for the property interest taken. 'He is entitled to be put in as good a position pecuniarily as if his property had not been taken. He must be made whole but is not entitled to more.' *Olson* v. *United States,* 292 U.S. 245, 255. In many cases this principle can readily be served by the ascertainment of fair market value—'what a willing buyer would pay in cash to a willing seller.' *United States* v. *Miller,* 317 U.S. 369, 374. See *United States* v. *Commodities* Corp., 339 U.S. 121, 123; *United States* v. *Cors,* 337 U.S. 325, 333. But this is not an absolute standard nor an exclusive method of valuation. See *United States* v. *Commodities Corp., supra,* at 123; *United States* v. *Cors, supra,* at 332; *United States* v. *Miller, supra,* at 374-375; *United States* v. *Toronto Nav. Co.,* 338 U.S. 396."

In *Edwin Moss and Sons, Inc.* v. *Argraves,* 173 A.2d 505, the Supreme Court of Errors of Connecticut held that in a condemnation proceeding the existence of sand and gravel on the land should be taken into consideration as a factor in determining the market value of the land, but that these deposits could not be considered as merchandise to be valued separately from the value of the land.

An entire tract of land belonging to the landowner was taken for highway purposes. The highway commissioner appraised the property at $33,000. Upon appeal the referee valued the property at $37,500 but failed to take into account the presence of sand and gravel thereon.

The appellate court noted that the landowner had entered into a contract to sell all of the sand and gravel, and would have received about $30,000 therefor, based on the contract price and concluded that the referee erred

in finding that the evidence was insufficient for him to consider its presence in his valuation of the property.

In the case, the Court stated:

> "We confine our discussion to one of the plaintiff's assignments of error which is dispositive of this appeal. This is the referee's failure to take into account, in evaluating the property, the presence of sand and gravel. The referee found that the property included about 100,000 cubic yards of sand and gravel at the date of taking and that on that date a contract between the plaintiff and Lizza and Sons, Inc., provided for the removal of all of it. Lizza and Sons, Inc., were to pay thirty cents per cubic yard for sand and gravel in the bank and to perform, without cost to the plaintiff, all the requirements as to grading and other matters which were set forth in the permit for removal issued by the town of Milford. Under these findings, the plaintiff, but for the condemnation, apparently would have receive about $30,000 for the sand and gravel present on the property on the date of the taking."

> "The referee followed the testimony of the witness Norman R. Benedict, who valued the land at $1850 an acre. Since there were slightly more than twenty acres, a valuation of $37,500, the figure reached by the referee, would be the approximate result. In the absence of any satisfactory explanation, and we find none, the referee's refusal, in evaluating the property, to consider the sand and gravel as a factor was erroneous, and the report should not have been accepted."

On this principle, it is manifest that where the respondent utilized the 140,000 cubic yards of gravel on the school

project, valued by the respondent's witnesses as above stated, the land appraisal value of $20,000 could not stand as just compensation for the loss to the petitioners without taking into consideration the said gravel as a factor in determining the market value of the land.

In *Roberts, Receiver, et al.* v. *New York City, et. al.*, 295 U.S. 264, *certiorari* was granted to review a judgment from a State Court in condemnation proceedings.

The criteria laid down by the Court was stated as follows by Mr. Justice Cardozo at pages 277-278:

> "In condemnation proceedings as in lawsuits generally the Fourteenth Amendment is not a guaranty that a trial shall be devoid of error. *West Ohio Gas Co.* v. *Public Utilities Comm'n. (No. 1)*, 294 U.S. 63, 70. To bring about a taking without due process of law by force of such a judgment, the error must be gross and obvious, coming close to the boundary of arbitrary action. The test has been differently phrased by different judges and in different contexts. At times we find the statement that the Constitution is not infringed unless there has been 'absolute disregard' of the right of the owner to be paid for what is taken. *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U.S. 226, 246; *Backus* v. *Fort Street Union Depot Co.*, 169 U.S. 557, 565; *Appleby* v. *Buffalo*, 221 U.S. 524, 532. At other times we are told that due process is not lacking unless 'plain rights' have been ignored, with a reminder that much will be overlooked when there is nothing of unfairness or partiality in the course of the proceedings. *McGovern* v. *New York City, supra*, at p. 373. From the very nature of the problem these phrases and others like them are approximate suggestions rather than scientific definitions. In last resort the line of division is dependent upon differ-

ences of degree too subtle to be catalogued. *Hudson County Water Co.* v. *McCarter,* 209 U.S. 349, 355; *Klein* v. *Board of Supervisors,* 282 U.S. 19, 23. Cf. *Davidson* v. *New Orleans,* 96 U.S. 97, 104. One cannot hope to mark its bearings in a sentence or a paragraph. Enough for present purposes that when the hearing has been full and candid, there must ordinarily be a showing of something more far-reaching than one of dubious mistake in the appraisal of the evidence. Due process is a growth too sturdy to succumb to the infection of the least ingredient of error. 'It takes more than a possible misconstruction by a court to make a case under the Fourteenth Amendment.' *Seattle, R. & S. Ry. Co.* v. *Linhoff,* 231 U.S. 568, 570."

There were various objectionable features in the evidence of the respondents sole expert real estate witness, apparent during his testimony, which related to eminent domain and evidentiary problems and were insufficient to raise the question of due process under the Fourteenth Amendment of the United States constitution. *Roberts supra.*

Irrespective of the presence or not of constitutional grounds for objection during such testimony, the appraisal evidence of the witness, standing in flagrant contradiction to the subsequent evidence of the respondent's witnesses Palmer and Bern which shows 140,000 cubic yards of fill utilized and valued as above related, if allowed for the jury's consideration, shows a violation of due process under the criteria of Roberts. It is apparent on the record that there was gross and obvious error in the refusal of the petitioners' Motion to Strike the appraisal evidence of Conway in its status as stated above.

The ruling of the appellate court below that the trial court's refusal to grant the petitioners' Motion to Strike

the entire evidence of the witness Conway, made at the close of the evidence in the case, was not reviewable as of right since the motion was not presented during or at the termination of the evidence of the witness, violates this petitioners' rights for due process under the Fourteenth Amendment of the United States constitution, for the reasons:

(1) There was no basis for a constitutional question of due process and just compensation at or during the testimony of Conway.

(2) Even if there were such a basis for a constitutional question of due process and just compensation at the stage of Conway's testimony the constitutional question arising on the evidence of Palmer and Bern was not present during Conway's evidence, and in its application to the evidence of Conway would compel the striking of the entire evidence of Conway. There was neither right nor opportunity to exercise this right during or at the termination of Conway testimony.

This petitioner contends that the ruling of the appellate court below is in conflict with *Chicago Burlington R. R.* v. *Chicago,* supra, and *Roberts* supra.

If the criteria of these cases are met and show a violation of rights under the constitutional guaranty, does not the ruling of the appellate court below denying the right of review on the grounds of the procedural and evidentiary rules stated in its opinion, subordinate the constitutional guarantee for due process and just compensation under the Fourteenth Amendment of the United States constitution, to the state rules construed?

This petitioner contends that this is the result of the decision, and that the absence of the right and opportunity

for it to present to the trial court, at the close of the evidence, its Motion to Strike the entire evidence of the respondents' sole expert witness in the circumstances of the constitutional violation apparent on the record, as of right, is a most serious invasion of this petitioners right of constitutional immunity. It is submitted that this invasion of right is of great importance to the public in its interest of general security implicit in condemnation proceedings. There is the added significance by reasons of the large and growing volume of eminent domain litigation.

II. It is apparent on the record, that the trial court's ruling to which your petitioner duly excepted, denying its Motion For a New Trial on the grounds that the jury's verdict was against the law, since it violated the rights of the petitioner for due process and just compensation for its property taken by the respondent by eminent domain, as guaranteed by the Fourteenth Amendment of the Constitution of the United States, and was prejudicial error.

The verdict of $70,000 is not supported by competent evidence and within the range of expert testimony.

The verdict cannot be supported by Conway's evidence as for his stated reasons for his opinions were patently unsound and without support on the record.

On Bern's testimony the subject land was adaptable for the construction thereon of a junior high school building, to accommodate 1300 students, together with playgrounds, by the use of the 140,000 cubic yards of gravel on the premises, valued by him at $280,000 less $80,000 to $100,000 for spreading the gravel. His testimony was that this was accomplished with satisfaction for use as such. Conway's testimony is incompetent relevant to the special use of the land for the junior high school on the grounds that his appraisal precludes consideration of the gravel material, and states that outside fill was needed, at great cost for the project. There is no com-

petent evidence to sustain the verdict of $70,000 as a special use property and this petitioner's loss is not represented by the verdict by any economic view in the law.

The basic principle, for a reviewing court reviewing a jury's verdict in an eminent domain case, is that if the jury's award is supported by competent evidence and is within the range of expert testimony, it will not be disturbed. "*. . . unless (the court) conclude(s) that the jury's verdict was based on opinion testimony of an expert witness whose stated reasons for his opinion were 'patently unsound and without support in the record'* (citing cases)." *Winston* v. *U.S.*, 342 F.2d 715, 720 9th Cir. 1965. (Emphasis added).

In the application of this principle, it is apparent that the verdict cannot stand, and is in violation of the constitutional guaranty to this petitioner as stated above.

III. It is apparent on the record that the jury's verdict cannot be sustained on grounds, exclusive of the Federal question raised under the Fourteenth Amendment to the Constitution of the United States.

It is apparent from the foregoing considerations that the jury's verdict cannot be sustained on the grounds exclusive of the Federal question raised under the Fourteenth Amendment to the Constitution of the United States.

Conclusion

For the foregoing reasons this petition for writ of certiorari should be granted.

Respectfully submitted,

EDWARD J. DAVIS
50 State Street
Boston, Massachusetts
Attorney for Petitioners

Appendix A

INVOKING CONSTITUTIONAL RIGHTS

This petitioner invoked its claim of violation of its constitutional rights under the Fourteenth Amendment of the Constitution of the United States, in argument presented to the Supreme Judicial Court of Massachusetts on the case as appears below:

B. The appellant claims that the denial of the Petitioners' Motion To Strike the evidence of the respondent's "expert witness" Conway, prescribed a rule of law for the jury which was in absolute disregard of the appellant's right to just compensation, and the court's action was wanting in the due process of law required by the Fourteenth Amendment of the Constitution of the United States. *Chicago Burlington R.R.* v. *Chicago,* 166 U.S. Reports 226, 246.

In the court's decision, it was held:

1) "A judgment of a state court, even if authorized by statute, whereby private property is taken for public use, without compensation made or secured to the owner, is, upon principle and authority, wanting in the due process of law required by the Fourteenth Amendment of the United States."

2) "But a State may not, by any of its agencies, disregard the prohibitions of the Fourteenth Amendment. Its judicial authorities may keep within the letter of the statute prescribing forms of procedure in the courts and give the parties interested the

fullest opportunity to be heard, and yet it might be that its final action would be inconsistent with that amendment. In determining what is due process of law regard must be had to substance, not to form."

3) That a verdict of nominal damages by a jury in a proceeding to ascertain the compensation due to a railroad company arising from the opening of a street across its tracks—the "land" not being taken, but the said use taken by the condemnors—on the facts of the case, was not wanting in due process of law under the Constitution.

At page 251 the court said:

> "If prior to the institution of these proceedings, the railroad company had constructed upon the land embraced within the crossing, buildings to be used in its business, it would have been necessary for the jury in ascertaining the just compensation to be awarded, to take into consideration the value of such buildings."

It is evident on the court's decision that a verdict by the jury of nominal damages, if there were buildings on the land taken at the time of taking and of substantial value, would violate the requirement of due process, "as it would have been necessary for the jury in ascertaining the just compensation, to take into consideration the value of such buildings." That is, it would rest on the premise that the verdict would violate the test of fair market value as just compensation, as predicated on its definition as stated—*Boom Co.* v. *Patterson*, 98 U.S. 403, 408, cited in the opinion.

On this principle, it is submitted that in the instant case a deposit of 140,000 cubic yards of gravel fill, worth on

testimony of the expert witness Conway $1.55 per cubic yard and up, at the time of the taking, which fill was on the subject property at the time of the taking, manifestly precludes a value of the land by him at $20,000; and to allow the appraisal for the jury's consideration violates the test of market value in abrogating the use of the soil deposit as a consideration with all the adaptable uses of the property.

The basic principle, for a reviewing court reviewing a jury's verdict in an eminent domain case, is that if the jury's award is supported by competent evidence and is within the range of expert testimony, it will not be disturbed. "... unless [*the court*] *conclude(s) that the jury's verdict was based on opinion testimony of an expert witness whose stated reasons for his opinion were 'patently unsound and without support in the record'* [citing cases]." *Winston* v. *U.S.*, 342 F.2d 715, 720 (9th Cir. 1965) (Emphasis added).

"The only issue was fair market value of the land as of the date of the taking." (R. 1) The only evidence of the respondent other than that of the witness Conway, on the issue, was that of the testimony of Palmer and Bern.

The testimony of Palmer is incompetent to support the verdict, and confirms that no outside fill was brought in and that the fill on the premises was sufficient and used for the school project.

Bern's testimony was that 140,000 cubic yards of fill was excavated and spread on the site of the school project; that as of the time of the taking the cost of the fill would be around $2. a cubic yard to be brought to the site and spread; that the cost to spread the fill on the subject property would be $80,000. to $100,000.

The testimony of witnesses Palmer and Bern considered individually, or as a whole, is incompetent to support the verdict on the issue of fair market value.

The opinion testimony of the witness Conway was based on stated reasons for his opinion which were patently unsound and without support in the record, and his evidence taken individually, or with all the other evidence of the respondent as a whole, was incompetent to support the verdict.

In *Chicago, Burlington and Quincy R.R. Co.* v. *Chicago, supra,* the court held that as a reviewing court on the constitutional question that it was "... permitted only to inquire whether the trial court prescribed any rule of law for the guidance of the jury that was in absolute disregard of the company's right to just compensation." (p. 246)

The motion to strike was the proper process to expunge the evidence of the witness Conway *(Greenspan* v. *County of Norfolk,* 264 Mass. 9, 13; *Smith* v. *Commonwealth,* 210 Mass. 259, proper after cross examination and with reference to the stage of the trial), which on the rule of law stated above was incompetent to support the verdict, the record showing the other evidence of the respondent on the issue as incompetent to support the verdict either on the footing of such evidence or taken together with that of the evidence of the witness Conway.

It is submitted that the allowance by the court of the appraisal of the witness Conway to stand for the consideration of the jury, prescribed a rule of law for the jury in absolute disregard of the appellant's right to just compensation, and the court's action was wanting in the due process required by the Fourteenth Amendment to the Constitution of the United States.

Appendix B

LAW NO. 13,657

EMMA J. LEONARDI, *et al*,
Counsel for Plaintiff,
v.
CITY OF PEABODY,
Counsel for Defendant.

James S. Ellis
Edward J. Davis
City Solicitor

Essex Superior Land Damage Intervenor's Exceptions
Entered June 23, 1966

Argued by intervener December 8, 1966.
December 30, 1966. Exceptions overruled.

Rescript December 30, 1966.

Reasons as stated in rescript.

A true copy,
Attest:
RICHARD A. MCLAUGHLIN
Clerk of the Supreme Judicial Court
for the Commonwealth
July 5, 1967.

Appendix C

COMMONWEALTH OF MASSACHUSETTS.

Supreme Judicial Court for the Commonwealth,
At Boston,

December 30, 1966.

IN THE CASE OF

EMMA J. LEONARDI & others,

v.

CITY OF PEABODY.

Pending in the Superior Court
for the County of Essex

ORDERED, that the following entry be made in the docket; viz.,—

Exceptions overruled.

Brief statement of the grounds and reasons of the decision:

Two exceptions are before us following the trial of a petition for the assessment of damages for the taking of land by the city. The first relates to the denial of the petitioners' motion, made at the close of the evidence, that the entire testimony of the city's only qualified witness, who had testified without objection earlier in the trial, be struck from the record. That a party is not as of right entitled to have such a motion allowed has been discussed and decided with full citation of cases in *Crowley* v. *Swanson,* 283 Mass. 82, 85, *Cummings* v. *National Shawmut Bank,* 284 Mass. 563, 566-568 and *Solomon* v. *Dabrowski,* 295 Mass. 358, 359-360. The other exception is to the denial of the motion for a new trial. The considera-

tions which govern the disposition of a motion for a new trial were stated at length in *Bartley* v. *Phillips*, 317 Mass. 35, 40-44, and have been so frequently confirmed and applied by us as not to require repetition. *Haven* v. *Brimfield*, 345 Mass. 529, 533-534. There was no error.

December 30, 1966.

A true copy,

Attest:

By the Court,

/s/ Richard A. McLaughlin

Richard A. McLaughlin

Clerk of the Supreme Judicial Court for the Commonwealth

July 5, 1967.

SUPERIOR COURT.

VS.

EMMA J. LEONARDI ET ALI

COUNSEL FOR PLAINTIFF

James S.Ellis, (294 Washington St., Boston)
→ 15 COURT 30 BOSTON
Edward J. Davis (11 Pemberton Sq.) Boston 8 -
→ 50 State St.

DATE	No.	DOCKET ENTRIES
1964 Apr 15	1	Petition for Assessment of Land Damage
17		Ord. not. ret. June
May 28	2	Return of service
Jun 1	3	Petition of All Concessions, Inc., C & Arthur R. DeRosa to intervene
1965 Jan 22	4	Plffs.' mot. to strike petition to i
Feb 5	5	Plffs.' waiver of plffs.' mot. to to intervene
Mar. 3	6	Plffs. motion to advance.
15		Motion #6 allowed. Case advan Jury short list at Salem.
15	7	Defts appearance.
Jun. 28	8	Memo of trial - Ford, J.
Jul. 1	9	Verdict for the petitioners in the a
1	10	Stipulation.
12	11	Plffs' mot. for new trial
16	11a	Mot of intervening petitioner All Concessions Inc. to
16		After hearing, motion denied. W
19	12	Acknowledgments of M. Irving Herbe receipts of notice of denials of plffs' moti

SUPERIOR COURT, COMMON LAW

No. 129203

VS.

EMMA J. LEONARDI ET ALI — CITY OF PEABODY

COUNSEL FOR PLAINTIFF	COUNSEL FOR DEFENDANT
James S. Ellis, (294 Washington St., Boston) → 15 COURT 30 BOSTON Edward J. Davis (11 Pemberton Sq.) Boston 8 → 50 State St.	M. Irving Herbster, City Solicitor, Peabody for Intervenors

DATE	No.	DOCKET ENTRIES
1964 Apr 15	1	Petition for Assessment of Land Damages.
17		Ord. not. ret. June
May 28	2	Return of service
Jun 1	3	Petition of All Concessions, Inc., Arthur A. DeRosa & Arthur R. DeRosa to intervene
1965 Jan 22	4	Plffs.' mot. to strike petition to intervene
Feb 5	5	Plffs.' waiver of plffs.' mot. to strike petition to intervene
Mar. 3	6	Plffs. motion to advance.
15		Motion #6 allowed. Case advanced to the next jury short list at Salem.
15	7	Def's appearance.
Jun. 28	8	Memo of trial - Ford, J.
Jul. 1	9	Verdict for the petitioners in the sum of $70,000.00.
1	10	Stipulation.
12	11	Plffs.' mot. for new trial
16	11a	Mot. of Intervening Petitioner All Concessions, Inc. to extend time for filing Bill of Exceptions to July 16, 1965 - filed - allowed.
16		After hearing, motion denied. Without costs
19	12	Acknowledgments of M. Irving Herbster, Esq. on 7/16/65 of receipts of notice of denial of plffs.' mot. for new trial

ADDITIONAL PLAINTIFFS
Jean V. Fornari Patricia B. Nazzaro

ADDITIONAL DEFENDANTS

J	1 CONTRACT (OR TORT)
S	2 MOTOR VEHICLE TORT
AD DAMNUN	3 OTHER TORTS
$	4 LAND TAKINGS X
	5 OTHERS 1
	COUNTS

SUPERIOR COURT, COMMON LAW

No. 129208

EMMA J. LEONARDI ET ALI

vs.

CITY OF PEABODY

COUNSEL FOR PLAINTIFF	COUNSEL FOR DEFENDANT

DATE	No.	DOCKET ENTRIES
1965 Oct 20	22	Motion of Intervening Petitioner All Concessions, Inc. to extend time for filing its Bill of Exceptions to November 17, 1965 - filed and allowed.
20	23	Motion of Intervening Petitioner All Concessions, Inc. to extend time for filing its Bill of Exceptions in the matter of the Court's denial of motion for new trial - filed and allowed.
Nov. 10	24	Motion of Intervening Petitioner All Concessions, Inc. to extend time for filing its Bill of Exceptions to December 7, 1965 - filed and allowed.
10	25	Motion of Intervening Petitioner All Concessions, Inc. to extend time for filing its Bill of Exceptions in the matter of the Court's denial of motion for new trial to December 7, 1965 - filed and allowed.
30	26	Motion of Intervening Petitioner All Concessions, Inc. to extend time for filing its Bill of Exceptions to December 29, 1965 - filed and allowed.
30	27	Motion of Intervening Petitioner All Concessions, Inc. to extend time for filing its Bill of Exceptions in the matter of the Court's

ADDITIONAL PLAINTIFFS

ADDITIONAL DEFENDANTS

AD DAMNUM

$ /

1 CONTRACT (OR TORT)
2 MOTOR VEHICLE TORT
3 OTHER TORTS
4 LAND TAKINGS
5 OTHERS

COUNTS

DATE	No.	DOCKET ENTRIES — CONTINUED
1965 Jul 19	13	Acknowledgment by Edward J. Davis of receipt of notice on July 19, 1965 of the denial of [illegible]'s motion for new trial.
19	14	Exception of Intervening Petitioner, All Concessions, Inc. to denial of Petitioners' motion for new trial
21	15	Acknowledgment by James D. Ellis of receipt of notice on July 19, 1965 of the denial of [illegible]'s motion for new trial.
21	16	Motion of Intervening Petitioner, All Concessions, Inc. to extend time for filing Bill of Exceptions to October 9, 1965 - filed and allowed with time extended to September 13, 1965 with hearing on bill at Boston on September 21, 1965 at 10 A.M.
21	17	Motion of Intervening Petitioner, All Concessions, Inc. to extend time for filing Bill of Exceptions in the matter of the Court's denial of motion for new trial - filed and allowed with time extended to September 13, 1965 with hearing on Bill at Boston on September 21, 1965 at 10 A.M.
Sep. 8	18	Motion of Intervening Petitioner, All Concessions, Inc. to extend time for filing Bill of Exceptions to October 11, 1965 - filed and allowed.
8	19	Motion of Intervening Petitioner, All Concessions, Inc. to extend time for filing Bill of Exceptions in the matter of the Court's denial of motion for new trial to October 11, 1965 - filed and allowed.
23	20	Mot. of intervening petitioner All Concessions, Inc to extend time for filing Bill of Exceptions to 10/29/65 - filed + allowed
23	21	Mot. of intervening petitioner All Concessions Inc. to extend time for filing Bill of Exceptions in the matter of Court's denial of mot. for new trial to 10/29/65 - filed + allowed

TRUSTEES
1
2
4
5

COUNSEL FOR TRUSTEES
1
3

DATE	No.	DOCKET ENTRIES — CONTINUED
1965		denial of motion for new trial to December 29, 1965 ~ filed and allowed.
Dec. 29	28	Bill of Exceptions of Intervening Petitioner All Concessions, Inc.
30		Ford, J. notified of above entry.
1966 Jan. 6		Bill of Exceptions of Intervening Petitioner All Concessions, Inc. allowed after hearing.
14	29	Reg. mail notice to order ~~for~~ entering.
17	30	Intervenor's Order for Preparation of the Record.
Apr. 8	31	Estimate.
8	32	Motion of Intervening Petitioner All Concessions, Inc. to amend Bill of Exceptions - filed and allowed.
15	33	Payment of Estimate.
June 22	34	Transmitted to Full Court, S.J.C. and parties notified.
1967 Jan. 3	35	Rescript. Exceptions overruled.
9	36	Intervening Petitioner All Concessions, Inc. notice of application to the Supreme Judicial Court for a rehearing.
13	37	Mot. of intervening petitioner All Concessions Inc. to continue case for Judgment.
Feb 23	38	Notice from Supreme Judicial Court that request of Intervening Petitioner for re-hearing was denied on Jan. 31, 1967.
27	39	Judgment for Plaintiffs Thomas J. Leonardi, Jean V. Fornari and Patricia B. Mazzaro. Damages $83,475.00, Costs $44.70. Judgment for Defendant vs All Concessions, Inc., Intervenor.
28		Execution issued.

A True Copy. Attest
(s) DONALD E. NUTTING
Ass't Clerk [SEAL]

TRUSTEES
1
2
3
4
5

COUNSEL FOR TRUSTEES
1
2
3
4
5